

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
SERGIO ZAVALA-CERVANTEZ,  
Defendant.

NO. CR-06-0016-RHW

**ORDER DISMISSING  
DEFENDANT'S MOTION  
UNDER 28 U.S.C. § 2255 TO  
VACATE, SET ASIDE, OR  
CORRECT SENTENCE BY A  
PERSON IN FEDERAL  
CUSTODY**

Before the Court is Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 86). Defendant is proceeding *pro se*.

On September 24, 2007, Defendant entered into a plea agreement in which he plead guilty to Distribution of a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1). The Government dismissed Counts 2 and 3, which also charged Defendant with Distribution of a Controlled Substance pursuant to the plea agreement. The parties stipulated to a base offense level of 34, and stipulated that Defendant would be accountable for 216.3 grams of actual methamphetamine. The plea agreement anticipated that Defendant's criminal history category was III, but indicated that the final criminal history score would be determined after the Presentence Investigative Report was complete. The parties believed the Guideline range would be 135-168 months, and Defendant reserved the right to seek a non-Guideline sentence of 90 months. Defendant expressly waived his right to appeal

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1 his conviction and the sentence imposed by the court, provided the sentence was  
2 within or below the applicable sentencing Guidelines range as determined by the  
3 Court. Defendant waived his right to file any post-conviction motions under 28  
4 U.S.C. § 2255, attacking his conviction or sentence, except an appeal based on  
5 ineffective assistance of counsel.

6 On January 22, 2008, Defendant was sentenced to 143 months, 4 years  
7 supervised release; and \$100 special assessment. Defendant appealed his sentence,  
8 based on ineffective assistance of counsel. On January 11, 2010, the Ninth Circuit,  
9 in a memorandum decision, affirmed the sentence. The Ninth Circuit declined to  
10 address Defendant's claim that he received ineffective assistance of counsel at  
11 sentencing because his trial counsel failed to advocate for a 90-month sentence,  
12 despite having negotiated the right to argue for such a sentence in his plea  
13 agreement.

14 On May 12, 2010, Defendant filed his Motion to Vacate, asserting three  
15 grounds for relief: (1) Defendant received two criminal history points for driving  
16 on suspended license; (2) at the time of the plea agreement, the Government did  
17 not count misdemeanors as criminal history points, but these were counted at  
18 sentencing; and (3) ineffective assistance of counsel because his attorney did not  
19 advise him of a potential 90-month plea agreement; rather he was induced to sign  
20 for the 151-188 month sentence.

21 Under 28 U.S.C. § 2255, a court may grant relief to a federal prisoner who  
22 challenges the imposition or length of his or her incarceration on any of the  
23 following four grounds: (1) that the sentence was imposed in violation of the  
24 Constitution or laws of the United States; (2) that the court was without jurisdiction  
25 to impose such sentence; (3) that the sentence was in excess of the maximum  
26 authorized by law; or (4) that the sentence is otherwise subject to collateral attack.  
27 28 U.S.C. § 2255(a). A petitioner must allege specific facts that, if true, would  
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entitle the petitioner to relief. *See United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir.2003) (citing *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir.1996)).

Pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts (“Rule 4”) the Court must independently examine a Section 2255 motion to determine whether summary dismissal is warranted. Dismissal is appropriate if the movant’s “allegations, viewed against the record, either fail to state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal.” *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985); *see also United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003).

Viewing the record under this standard, the Court finds that Defendant has failed to state a claim for relief. Notwithstanding that Defendant waived his right to attack his sentence, Defendant did not receive two criminal history points for Driving with License Suspended—rather he received 1 point for a third degree driving with license suspended. In addition to that 1 point, Defendant received criminal history points for Obstructing a Public Officer; Assault - Domestic Violence; Driving Under the Influence; and Possession and Delivery of Methamphetamine. Defendant also received two points because he was under a term of probation when he committed the instant offense. Even if Defendant was successful in arguing that he should not have received his criminal history point for third degree driving with license suspended,<sup>1</sup> it would not have changed his criminal history score.

Likewise, Defendant has not stated a claim for ineffective assistance of

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<sup>1</sup>Defendant does not provide any legal authority in support of his argument that these convictions should not have been counted, and did not make this argument before the Ninth Circuit Court of Appeals.

1 counsel. In order to state a claim for ineffective assistance of counsel, Defendant  
2 must show that 1) his counsel's performance fell below an objective standard of  
3 reasonableness and 2) he was prejudiced by such deficiency. *Strickland v.*  
4 *Washington*, 466 U.S. 668, 687 (1984). Here, Defendant has failed to allege that  
5 he was prejudiced by the alleged deficient performance of his counsel, because he  
6 has not established any basis for his counsel to argue that a below-Guideline  
7 sentence would have been appropriate in this case. Moreover, there is no evidence  
8 in the record that Defendant should have received a below-Guideline sentence. At  
9 the sentencing hearing, the Court carefully considered the factors set forth in 18  
10 U.S.C. § 3553. The Court considered Defendant's criminal history, including  
11 assaults, a number of failures to appear, and bench warrants issued for failure to  
12 appear, the fact that he was involved in the sale of drugs over a period of time, the  
13 fact that in some of the circumstances the amount of drugs were in large quantities,  
14 the fact that there were reoccurring drug sales, and that if the Government pursued  
15 a conviction under the other counts, Defendant would have been facing a  
16 mandatory minimum 10-year sentence, as opposed to a 5-year mandatory  
17 minimum sentence. Additionally, the Court noted that Defendant was in the  
18 country unlawfully. The Court ultimately concluded that a low-end Guideline  
19 sentence was reasonable, and credited Defendant with 8 months for the time he  
20 was incarcerated by the state of Washington. Defendant has not plead facts that  
21 would indicate that this sentence was unreasonable, or that his counsel was  
22 deficient for not arguing that he was entitled to a 90-month sentence.

23 A § 2255 movant cannot appeal from the denial or dismissal of his § 2255  
24 motion unless he has first obtained a certificate of appealability. 28 U.S.C. §  
25 2253(c); Fed. R.App. P. 22(b). A certificate of appealability will issue only when a  
26 movant has made "a substantial showing of the denial of a constitutional right." 28  
27 U.S.C. § 2253(c)(2). To satisfy this standard when the court has dismissed a §  
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1 2255 motion (or claims within a § 2255 motion) on procedural grounds, the  
2 movant must show that reasonable jurists would find debatable (1) whether the  
3 court was correct in its procedural ruling, and (2) whether the motion states a valid  
4 claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484,  
5 (2000).

6 Recently amended Rule 11 of the Rules Governing § 2255 Proceedings  
7 provides that the district court must issue or deny a certificate of appealability at  
8 the time it enters a final order adverse to the movant. Rule 11(a), 28 U.S.C. foll. §  
9 2255. After carefully considering the record and the relevant case law, the Court  
10 finds that reasonable jurists would not find the Court's determination that  
11 Defendant has not adequately stated a claim for relief to be debatable or wrong.  
12 Accordingly, a certificate of appealability will not be issued.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or  
15 Correct Sentence by a Person in Federal Custody (Ct. Rec. 86) is **dismissed**.

16 2. The Court declines to issue a certificate of appealability. Defendant is  
17 advised that he may still request a certificate of appealability from the Ninth  
18 Circuit Court of Appeals, pursuant to Federal Rule of Appellate Procedure 22(b)  
19 and Local Ninth Circuit Rule 22-1.

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
21 this Order and forward copies to Defendant.

22 **DATED** this 28<sup>th</sup> day of May, 2010.

23  
24 s/Robert H. Whaley

25 ROBERT H. WHALEY  
26 United States District Court

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